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SUPREME COURT, U. S.

No. 388

In the Supreme Court of the United States

October Term, 1970

TIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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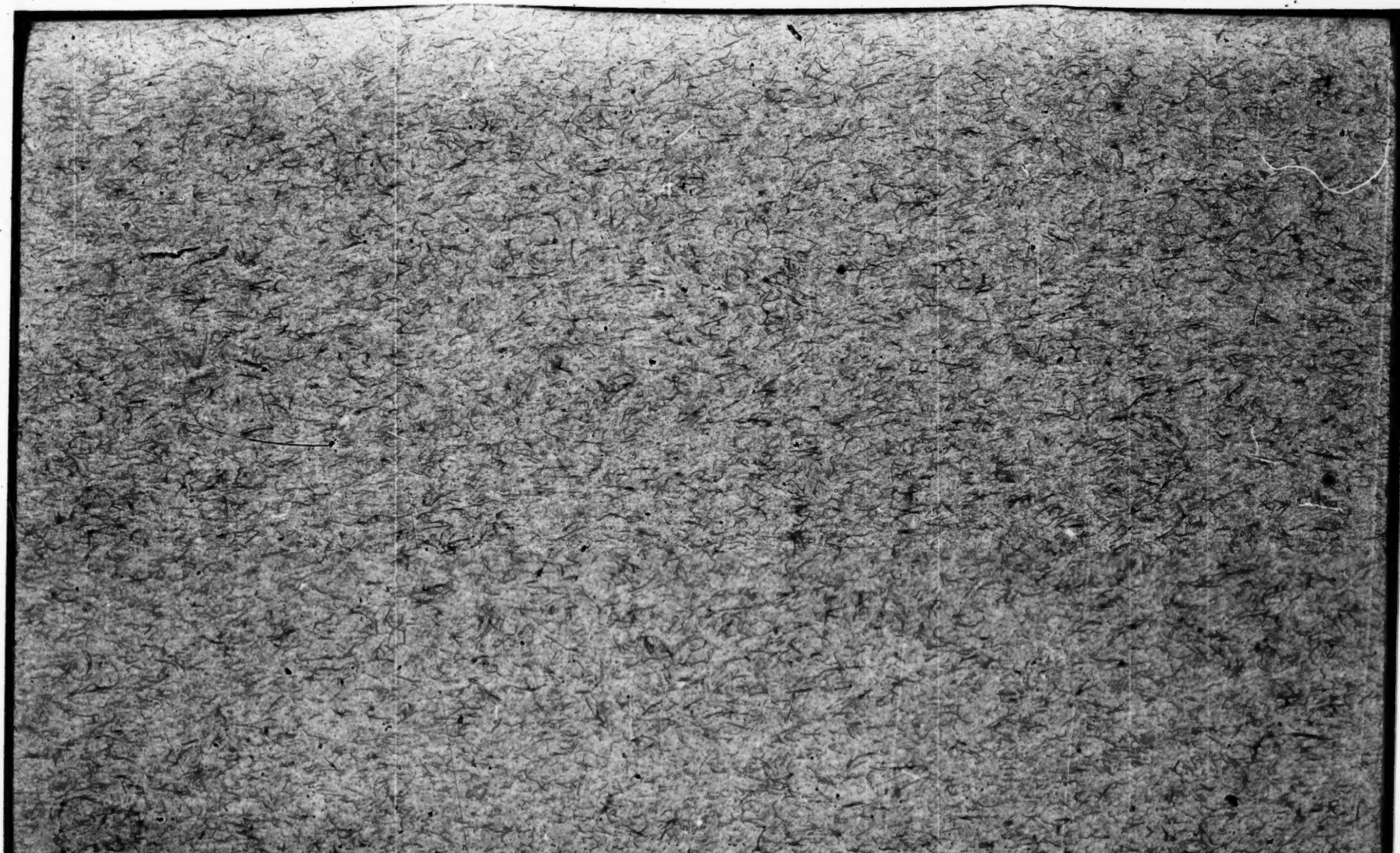

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 654

THIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that the Company committed numerous violations of the National Labor Relations Act, which included an unlawful refusal to bargain with the Union. The Trial Examiner recommended a conventional remedy for these violations, ordering the Company, *inter alia,* to cease and desist from its unlawful conduct and to bargain with the Union upon request (Pet. App. 34a–45a). He declined the Union's request for an order requiring the Company to make

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the employees whole for wages and benefits which they might have obtained and to pay the Union the amount of dues and initiation fees which it might have received but for the Company's unlawful refusal to bargain, on the ground that use of these novel remedies should first be considered by the Board, which had the issue before it in other cases (Pet. App. 38a). The Board affirmed the remedy without comment (Pet. App. 2a–4a).

2. The court of appeals sustained the Board's unfair labor practice findings and enforced its order (Pet. App. 47a, 50a, 62a). However, the court, Judge MacKinnon dissenting, also concluded that the Board had not provided "a satisfactory justification" (Pet. App. 52a) for rejecting the Union's request for additional relief. It asserted that the "make-whole" remedy was within the Board's power under the Act and not precluded by *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (Pet. App. 56a–62a). It added that, "even if the Board declines to take the steps advocated by the Union, it may conclude that some other remedies will at least do something to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation" (Pet. App. 57a). The court accordingly remanded the case to the Board "for further consideration of the make-whole claim * * * with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part. If the

Board believes that alternative remedies, beyond those already granted are more appropriate, it should so state.[1] The assessment of these matters is for the Board" (Pet. App. 62a).

3. In these circumstances, the issue which the petition raises—whether the Board has power to compensate the employees for any benefits which they likely would have received had the employer bargained in good faith—is not ripe for review by this Court. It is true that the court of appeals has expressed the view that such a remedy is within the Board's power under the Act, while the Board has subsequently taken a contrary position in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (Pet. App. 79a–120a), petition to review filed, *sub nom. Automobile Workers* v. *National Labor Relations Board*, No. 24577 (C.A.D.C.).[2] However, should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals. Alternatively, it may provide lesser, alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here.

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[1] The court explained:

> The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these. [Pet. App. 62a, n. 15.]

[2] Petitioner has filed a motion for leave to file a second petition for rehearing before the court of appeals in light of the Board's decision in *Ex-Cell-O*.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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